

Summary of SC95483, *David G. DePriest v. State of Missouri* and SC95484, *Natalie R. DePriest v. State of Missouri*

Appeals consolidated from the St. Francois County circuit court, Judge Kenneth W. Pratte
Argued and submitted May 4, 2016; opinion issued February 28, 2017

Attorneys: David DePriest was represented by Lisa M. Stroup of the public defender's office in St. Louis, (314) 340-7662; Natalie DePriest was represented by Gwenda R. Robinson of the public defender's office in St. Louis, (314) 340-7662; and the state was represented in both cases by Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Two siblings charged with drug and weapons violations appeal the circuit court's judgments overruling, without an evidentiary hearing, their motions for post-conviction relief in which they argued their joint counsel had an actual conflict of interest in representing both siblings during plea negotiations and at the group plea hearing at which they both pleaded guilty. In a per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri vacates the judgments and remands (sends back) the cases to the circuit court. The siblings pleaded facts sufficient to support post-conviction relief due to their joint counsel's actual conflict of interest.

Judge Zel M. Fischer concurs. He agrees that the siblings' motions for post-conviction relief pleaded facts alleging an actual conflict of interest in the context of the plea bargain and that there is a presumption of prejudice in this context. He notes, however, that the state may rebut this presumption during the evidentiary hearing on remand. He further describes what the siblings must show to establish they were prejudiced.

Judge Paul C. Wilson also concurs. He writes separately because he believes counsel for post-conviction movants should be required – in filing amended motions on behalf of the movants – to follow the more formal requirements of Rule 55 concerning the form and style of civil pleadings.

Facts: Siblings David and Natalie DePriest were charged separately in connection with an alleged marijuana growing operation in their apartment. Each was charged with producing a controlled substance by cultivating more than five grams of marijuana, possession of a controlled substance with intent to distribute and unlawful possession of a weapon. They were represented by the same attorney. During plea negotiations, it became evident that the DePriests' interests diverged. Although counsel believed the case against the sister was much weaker than that against the brother, counsel continued to represent both – even when the prosecutor offered the sister a better deal if she testified against her brother and even when the prosecutor noted the potential conflict of interest and began conditioning plea offers on a joint plea agreement. Eventually, both DePriests followed counsel's recommendation to accept a joint offer of an open plea with worse terms than earlier offers. The circuit court accepted both pleas at a simultaneous group plea hearing for the DePriests and five unrelated defendants. As to the DePriests, the circuit court did not inquire into the joint representation or any conflict of interest. The sister pleaded guilty to just the first two counts, and the state dismissed the weapons charge against

her. The brother pleaded guilty to all three counts. Both received the recommended two concurrent 15-year sentences for two counts, and the brother received an additional, consecutive seven-year sentence for the weapons charge. The DePriests separately filed motions for post-conviction relief alleging ineffective assistance of counsel due to an actual conflict of interest in their concurrent representation. The circuit court overruled both motions without an evidentiary hearing. The DePriests appeal.

VACATED AND REMANDED.

Court en banc holds: Because the DePriests' motions alleged facts sufficient to sustain post-conviction relief, the circuit court erred in overruling their motions without an evidentiary hearing. Nothing in the record or case files plainly and conclusively refuted their allegations. When a movant bases a claim of ineffective assistance of counsel on an actual conflict of interest arising out of concurrent representation of multiple clients in the same set of facts and circumstances, the movant need not demonstrate prejudice to obtain relief. This holds true even when the concurrent representation involves plea negotiations and plea hearings rather than representation at trial. The DePriests' motions adequately raised these issues, and the concurring opinions' suggestion that movants are obliged to follow the requirements for filing a petition when seeking post-conviction relief was not briefed or argued by any party, and it ignores the rules regarding the filing of such motions. The problem caused by counsel's conflict of interest was made worse by the discredited practice the circuit court followed in holding a group plea hearing. As this Court previously has noted, group plea hearings are fraught with unnecessary risk and confusion and should be avoided.

Concurring opinion by Judge Fischer: The author agrees that, because the DePriests' amended motions for post-conviction relief pleaded facts alleging an actual conflict of interest, the circuit court clearly erred in overruling their motions without an evidentiary hearing. While the presumption of prejudice that results from pleading an actual conflict of interest may relieve a movant from pleading how the movant was prejudiced in the context of a plea bargain, the state may rebut – at the evidentiary hearing on remand – the presumption that one or both DePriests were prejudiced. To prove an ineffective assistance of counsel claim based on an alleged actual conflict of interest during the plea bargain, each DePriest must show not only that an actual conflict adversely affected the adequacy of counsel's performance but also that each suffered prejudice – a reasonable probability that he or she would have gone to trial or accepted or rejected a lapsed plea agreement, that the state would have adhered to the agreement and that the circuit court would have accepted it.

Concurring opinion by Judge Wilson: The author concurs in the principal opinion but writes separately because he believes counsel for post-conviction movants such as the DePriests should follow the requirements of Rule 55 concerning the form and style of civil pleadings rather than adopting the informal form and style of their clients' pro se motions. The rules governing such pro se motions are designed to make it easy for prisoners to identify all claims and supporting facts they wish to assert, but nothing in these rules requires or suggests counsel must follow the same form and style when preparing an amended motion. Even if Rule 55 does not compel post-conviction counsel to take a more orderly approach in drafting amended motions for post-conviction relief, their clients would be better served if counsel did so.